FILED
MAY 30 1996
CLERK

(3)

No. 95-1737

IN THE
UNITED STATES SUPREME COURT

OCTOBER TERM, 1995

VINCENT A. LUCAS

Petitioner,

v.

E. GORDON GEE, et al.

Respondents.

On petition for writ of certiorari to the Court of Appeals for Franklin County, Ohio

PETITIONER'S REPLY BRIEF

Vincent A. Lucas
2157 Summit St., Apt. 2
Columbus, OH 43201
(614) 294-8515
Petitioner, pro se

13pp

TABLE OF CONTENTS

Table of authorities.....ii
Argument.....1
1. Respondents' Brief in Opposition makes it clear that the Respondents do not have any meritorious arguments for why the Petitioner's Complaint should have been held not sufficient to state a First Amendment claim. 1
2. The Respondents' standing arguments are based on factual circumstances that no longer hold true. 3
3. The Petitioner has never stated or implied that he should not be accorded the benefit of the full liberal treatment any other non-lawyer would be entitled to.....3
4. This Court does have jurisdiction to review Petitioner's Question Presented No. 5 and well as the other Questions Presented for Review.....5
5. There are "special and important" reasons for granting certiorari.....5
Conclusion 8
Appendix
Lucas 4th Aff., Ex. 2, p. 1 (article from The Lantern on Apr. 11, 1994).....1a

TABLE OF AUTHORITIES

Cases

Ballou v. General Electric Co., 393 F.2d 398 (1st Cir. 1968) 7 n.8
Boag v. MacDougall, 454 U.S. 364 (1982) 6
Bonanno v. Thomas, 309 F.2d 320 (9th Cir. 1962) 7 n.8
Buchler v. U.S., 384 F.Supp. 709 (E.D. Cal. 1974) 7 n.8
Conley v. Gibson, 355 U.S. 41 (1957) 6-7
Haines v. Kerner, 404 U.S. 519 (1972) 6
Hughes v. Rowe, 449 U.S. 5 (1980) 6
Meyers v. First Nat'l Bank, 444 N.E.2d 412 (Ohio App. Hamilton Co. 1981) 6 n.7
Pennoyer v. Neff, 95 U.S. 714 (1877) 5
Powell v. Alabama, 287 U.S. 45 (1932) 4

Court Rules

Ohio Rule of Civil Procedure 15(A) 7
Ohio Rule of Civil Procedure 23(B) 2

Miscellaneous authorities

Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Ken S. Geller, Supreme Court Practice (7th ed. 1993) 7
5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d (1990) 1

Argument

1. The Respondents' Brief in Opposition demonstrates exactly why certiorari should be granted. For, although they summarily claim that "the facts stated in Lucas' complaint cannot fairly be stretched to encompass a[] [First Amendment] challenge,"[1] they never explain why the *facts* from the Complaint are supposedly not sufficient to state a First Amendment claim. They never explain what key factual elements necessary to a First Amendment case the Complaint supposedly fails to allege, nor what additional facts the Petitioner could have possibly alleged to cure the supposed "shortcomings" of his Complaint. Indeed, the Respondents' Brief has more to say about the Petitioner's choice of postage stamps than it does about what facts his Complaint is supposedly lacking.

In lieu of actual argument to support their claim that the Petitioner failed to allege sufficient facts to state a constitutional claim, the Respondents offer an incoherent hodgepodge of theories as to why the Complaint should have been dismissed. Their theories are utterly without merit:

The Respondents' argument that the prayer for relief "was not even remotely connected" to his First Amendment claims is without merit. This argument was treated in great detail in footnote 22 of the Petition (p. 24-5). In short, the relief sought (which included an injunction which would have required Gee to conduct future Senate meetings according to the Senate's largely content-neutral rules of debate) was perfectly appropriate and would have remedied the First Amendment claims by preventing First Amendment deprivations like those described in the Complaint from occurring again; and even if there were an inconsistency between the Petitioner's First Amendment claims and the relief sought, such inconsistency would be irrelevant to whether the Complaint states a claim, since, under established Ohio and federal law, "[t]he sufficiency of a pleading is tested by the statement of the claim and the demand for judgment is not considered part of the claim." 5 C. Wright & A. Miller, Federal Practice and Procedure: Civil 2d (1990) § 1255.

---

[1] Opp. 6-7 (emphasis added)

Respondents' argument that the Petitioner's First Amendment claims are not consistent with the Complaint's original status as a class action is even more meritless. Gee's rulings were not just that the *Petitioner* could not debate the constitutionality of the proposed Code change and not just that the *Petitioner* could not debate the merits of Petitioner's amendment thereto but that *none* of the senate members could. Indeed, Complaint ¶ 8(f) alleges "Gee ... ruled that any debate on the legality under the U.S. Constitution of the [proposed Code change] was out of order," not just debate by the Petitioner.[2,3] (emphasis added). Thus, all Senate members had similar First Amendment claims against Gee.

Despite the fact that all would-be class members have similar First Amendment claims against Gee, the Respondents apparently believe that First Amendment claims are inherently so "personal and individual in nature" that First Amendment claims can not be pursued in a class action. They cite no authority in support of their position, and their argument is contrary to the plain requirements of Ohio R. Civ. P. 23(B). The fact that the Respondents would now raise such an absurd argument shows how unsound the court of appeals' ruling was.

Finally, it is clear that the Respondents' only real objection to the Complaint of any arguable merit is that "[n]owhere in his [Complaint's] lengthy and highly specific exposition did Lucas in any way mention the First Amendment or any other provision of federal law..." (Opp. 7) -- in other words, the Petitioner did not allege the correct legal theory for his action --- a ground which the Ohio Supreme Court as well as "*every federal circuit*

---

[2] Similarly, Complaint ¶ 8(h) alleges "Gee ... did not allow debate on an amendment to [the Code change] ..." and not that Gee did not allow debate just by the Petitioner.

[3] Similarly, The Lantern, a newspaper published by Ohio State, describes the ruling as being one where nobody was allowed to debate the constitutionality of the policy, not just the Petitioner. " 'The constitutionality *can not be debated today*,' Gee said. 'At this point, it is assumed that the policy is constitutional.' " *Id.*, Apr. 11, 1994 (emphasis added) (Lucas 4th Aff. ¶ 4 Ex. 2) (App. 1).

that has ever considered [the] issue"[4] has held is not a valid ground for dismissing a Complaint.[5,6]

2. The Respondents' standing arguments are based on factual premises that have changed considerably since their brief was written. Contrary to their brief, the Petitioner HAS participated in Senate debates since he lost his position as a senator. *See* Petitioner's Supplemental Brief on the Issue of Standing. Also contrary to their brief, the Petitioner has attended three Senate meetings as a non-senator, not just one. For the reasons stated in Petitioner's Supplemental Brief, these facts amply demonstrate the Petitioner's standing in this case.

3. Contrary to what the Respondents' have implied, the Petitioner has never stated or implied that he should not be accorded the benefit of the full liberal treatment any other non-lawyer would be entitled to. To start with, the Petitioner has *never* argued in the court of appeals that he is in any way more qualified to prosecute this case than any other layman. Also contrary to their brief (Opp. 8), the Petitioner maintained consistently during the proceedings in the court of appeals that he was entitled to leeway in the construction of his pleadings because is a non-lawyer. Pet. 8 n.11.

Furthermore, the quotes in Opp. 8 are taken grossly out of context. Those passages come from the Petitioner's Reply Memorandum in Support of Class Certification. In that memorandum, the Petitioner, who was unaware of the Civil Rules' implicit requirement regarding the competency of a class

---

[4] Opp. 8 (emphasis added)

[5] Precisely because the legal theory of recovery alleged in the Complaint is not relevant in determining whether a Complaint states a claim, it is irrelevant that the Complaint's prayer asks certain votes to be declared void "pursuant to Robert's Rules of Order" (Opp. 7) as opposed to "pursuant to the First Amendment" or some other provision of federal law.

[6] Contrary to Opp. 7 n.2, the Petitioner has never claimed to have a "constitutional right to filibuster." Moreover, nothing in Robert's Rules of Order or the Senate's rules of procedure allows Gee to exclude at his sole discretion any subject of debate, even if relevant to the proposals being considered by the Senate, or to choose what amendments by which senators will be afforded Senate debate, and even if it did, it would be superseded by the First Amendment.

representative's counsel at the time he filed his motion for class certification, argued to the trial court, in an effort to save his motion for class certification, that the court should "grant class certification on the condition that [Petitioner] obtain an attorney within some period of time" specified by the court. *Id.* at 12. The Petitioner also suggested that the court may wish to consider allowing the Petitioner to represent the class on a tentative basis and "appointing additional counsel" if Petitioner could not handle the task. *Id.* at 10. Petitioner's arguments were based largely on his mistaken belief that this case would be "a rather simple one" requiring "little discovery" that would not involve any complex legal issues, and which could be "readily resolved" simply by listening to the tapes of the Senate meeting and looking to "Robert's Rules of Order" to see if "the defendants violate[d] the law." *Id.* at 7, 10. The Petitioner did argue in that memorandum, and that memorandum only, that because he had some familiarity with "legal research and writing" that he was "more qualified than the prisoners who were the subjects of most of the citations relied on by the defendants" in their Memorandum in Opposition to Class Cert., and, because the case was a simple one that could be easily resolved by looking to "Robert's Rules of Order," the Petitioner might "possess[] the skills necessary to prosecute the case," and if not, the court could "cure [any] defect in the representation by appointing additional counsel when it seems appropriate." *Id.* at 10, 12

In retrospect, the decision to deny class certification was a wise one. This case has involved legal issues vastly more complicated than those contemplated by the Petitioner when he filed his reply brief supporting class certification. Moreover, without any leeway from the court, even a "vastly" above average layman is usually no match for a lawyer in a court of law. "Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Powell v. Alabama,* 287 U.S. 45, 68-9 (1932). In fact, the Petitioner could only claim that he might be able to adequately prosecute this case *precisely because* he was anticipating from the trial court leniency because of his complete lack of legal training.

In any event, the Petitioner's Motion for Class Certification was denied over a month before the trial court's ruling

dismissing the case. After class certification was denied, it no longer mattered whether the liberal treatment the Petitioner was entitled to as a non-lawyer might not have been fully consistent with the Petitioner's statement that he might be able to prosecute this case adequately.

4. Contrary to Opp. 9-10, this court does have jurisdiction to review Petitioner's Question Presented No. 5. In *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877), this Court stated

> [D]ue process [requires that] ... [t]o give [judicial] proceedings any validity, there must be a tribunal competent by its constitution -- that is, by the law of its creation -- to pass upon the *subject-matter* of the suit ...

(emphasis added). The trial court dismissed the Complaint "with prejudice" although the trial court and court of appeals expressly found that the trial court lacked subject-matter jurisdiction over the only claims the court of appeals perceived had been properly raised. As *Pennoyer* makes clear, a court denies due process when it dismisses on the merits claims it determines it has no subject-matter jurisdiction to consider. Because the dismissal "on the merits" denies federal due process rights, this Court has jurisdiction to consider the issue.

The other Questions Presented for Review are also properly before this Court. Pet. 1 (whether a pleading sufficiently pleads a federal claim is a federal question); Pet. 7-9, 8 n. 11 (argument regarding leniency afforded *pro se* pleaders is properly before this Court). The Respondents' unsupported statements to the contrary merit no additional argument.

5. There are "special and important reasons" for granting certiorari in this case.

A. While arguing that this case presents no special and important reason for granting review because all the federal courts and the Ohio Supreme Court are in agreement on the issue of whether a complaint needs to allege the legal theory on which the action is based, the Respondents completely ignore the Petitioner's arguments regarding the national importance of a ruling by this Court regarding what leniency state courts must give *pro se* litigants when pleading federal claims. This case presents this Court with a unique opportunity to resolve the very

disturbing, ever-growing split of authority among the state courts regarding this issue. This Court will eventually have to resolve this split of authority anyway; it might as well do so now. Resolving this issue now will benefit countless thousands of litigants and will rectify a true miscarriage of justice in the instant case as well. Contrary to the Respondents' claims, Ohio law on the issue of the liberality afforded to *pro se* litigants is not "in full accord with widely established federal law"[7] and certainly is not in accord with federal law as applied to the Petitioner.

That the court of appeals did not expressly state in its ruling that the Petitioner was not entitled to more liberal treatment as a non-lawyer is of little, if any, relevance. In almost all of the cases in which this Court has considered this issue, the lower court of appeals also did not expressly mention the issue of the liberality to be afforded to a *pro se* litigant. *Haines v. Kerner,* 404 U.S. 519 (1972); *Hughes v. Rowe,* 449 U.S. 5 (1980); *Boag v. MacDougall,* 454 U.S. 364 (1982). It was only after an examination of the facts in those cases that this Court determined that the pleaders had not been afforded the leeway they were entitled.

B. This Court should also grant certiorari because of the clear conflict between the court of appeals' ruling and this Court's rulings in *Conley v. Gibson,* 355 U.S. 41 (1957); *Haines v. Kerner* and other cases. Contrary to the Respondents' beliefs, a clear conflict between a ruling sought to be reviewed and the rulings of this Court has always been considered a "special and important reason" for granting certiorari, regardless of whether a ruling on the case would resolve any split of authority among the lower courts. *See* Supreme Court Rule 10(c). Indeed, many commentators have noted that a direct conflict between an appellate court ruling and the

---

[7] E.g., one Ohio appellate court has held "Appellants' argument that as *pro se* civil litigants they should receive special consideration ... is against the weight of Ohio as well as national authority. *Pro se* civil litigants are bound by the same rules and procedures as those litigants who retain counsel." *Meyers v. First Nat'l Bank,* 444 N.E.2d 412, 413 (Hamilton Co. 1981). However, there are examples of Ohio appellate rulings to the contrary. To the Petitioner's knowledge, the Ohio Supreme Court has never ruled definitively on this issue.

decisions of this Court is "one of the strongest possible grounds for securing the issuance of a writ of certiorari." Stern, et al., Supreme Court Practice (7th ed. 1993) § 4.5.

> In *Conley v. Gibson, supra* at 45, this Court stated
> a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

The utter inability of the Respondents to explain what facts are supposedly missing from the Complaint to state a First Amendment claim demonstrates that there is a clear conflict between the court of appeals ruling and *Conley v. Gibson.* Indeed, none of the lower courts have *ever* stated why the facts in the Complaint are supposedly insufficient to state a First Amendment claim --- thus depriving the Petitioner of any meaningful opportunity to amend his Complaint pursuant to Ohio R. Civ. P. 15(A) to cure the supposed "defect".[8]

Given that at least *eleven of twelve* regional federal court of appeals circuits have held that a pleader need not plead the legal theory for his action, the Court should also grant certiorari to enforce widely established federal law on this issue. Contrary to Opp. 6, the court of appeals ruling cannot be fairly construed as a ruling that the Petitioner did not plead sufficient facts to state a claim; the ruling was not that the Petitioner did raise his First Amendment questions in the trial court but failed to allege sufficient facts in his Complaint to pursue his First Amendment claim, but instead the court could not review whether the "trial court erred in dismissing the First ... Amendment" claims purportedly because that his First Amendment claims *had not even been raised properly* in the trial court. But why? The Complaint plainly alleges that Petitioner was deprived his rights

---

[8] *See Ballou v. General Electric Co.*, 393 F.2d 398, 400 (1st Cir. 1968) ("[I]f a complaint is dismissed for failure to state a claim ... for their guidance in amending, plaintiffs should also be informed of the reason" the complaint was held insufficient); *Bonanno v. Thomas*, 309 F.2d 320, 322 (9th Cir. 1962) ("Where a complaint is dismissed on the ground that it fails to state a claim, the order should also inform the plaintiff of the reason for dismissal so that he can make an intelligent choice as to amending."); *Buchler v. U.S.*, 384 F.Supp. 709, 714 (E.D. Cal. 1974)

to speak at the Senate meeting[9] and the Petitioner raised at numerous times in his memoranda opposing dismissal in the trial court his First Amendment legal theory.[10] The only way the court of appeals' ruling can be reconciled with the facts of this case, if it can be reconciled at all[11], is if the court of appeals believed that a First Amendment claim is not properly raised unless the Complaint alleges that the legal theory on which the pleader relies involves the First Amendment -- a ground which *every federal circuit that has ever considered the issue* has held is not a valid reason for dismissing a Complaint.

Conclusion

Certiorari should be granted. This case is appropriate for summary reversal.

Respectfully submitted,
VINCENT A. LUCAS
Petitioner, pro se

---

[9] *See* Pet., Reasons for Granting the Writ, Sec. I, Subsec. B.

[10] Pet. App. 26a-31a.

[11] Remarkably, when read literally, the court of appeals' ruling holds that the Petitioner *never even raised his First Amendment arguments in the trial court*, although he plainly did in his memoranda opposing dismissal (Pet. App. 26a-31a), as was pointed out to the court of appeals numerous times throughout the proceedings in that court (Pet. App. 34a-37a).

By Amy Schafer
Lantern staff writer

Despite strong opposition, the University Senate approved revising the Code of Student Conduct's sexual harassment policy Saturday.

The proposal to revise the code was sponsored by the Council on Student Affairs, and it was presented by Kathleen Carberry, chairwoman of the council.

Carberry said the revision will make the Code of Student Conduct consistent with the sexual harassment policy as approved by the Board of Trustees.

"Students need the benefits of a consistent policy," she said.

Chris Smith, USG commuter representative, agreed that the university needed a uniform policy, but objected to the policy because of its vagueness.

Those opposed to the revision thought the policy was unconstitutional, and that students did not have adequate input into the revision process.

The question of constitutionality was raised by USG member Chris Meade, who said the policy seemed so broad, he could be brought up on charges for almost anything.

"I would hate to tell a joke that could be overheard by someone who was offended, and then be brought up on charges," Meade said.

OSU professor and faculty council member Harry Allen said

Meade's concerns were only interpretations of the policy, and that one cannot bring all legal interpretations of a policy into the debate.

University President E. Gordon Gee agreed, saying people will

> *"It's not really clear what the legal consequences are. It's a messy situation."*
>
> — David Goldberger

debate the constitutionality of the policy, but the debates should be done in the courts.

"The constitutionality can not be debated today," Gee said. "At this point, it is assumed that the policy is constitutional."

Another objection to the policy came from Rob Edmund, USG assembly speaker, who said many USG members needed time to discuss the revision with their constituents.

Edmund made a motion to

See POLICY/Page two